No. 89-1026

IN THE

Supreme Court of the United States

October Term, 1989

INDIANA COAL COUNCIL, INC. AND HUNTINGBURG MACHINERY & EQUIPMENT RENTAL, INC.

Petitioners,

vs.

INDIANA DEPARTMENT OF NATURAL RESOURCES, WABASH VALLEY ARCHAEOLOGICAL SOCIETY, INC., AND COUNCIL FOR THE CONSERVATION OF INDIANA ARCHAEOLOGY, INC.

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Indiana

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The primary issue on this Petition is whether the opinion of the Indiana Supreme Court in determining the takings issue, violates *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Petitioners[1] have demonstrated that the Indiana court's opinion thoroughly emasculates *Nollan*. Respondent does not mention, much less discuss, any of these violations of *Nollan*, thereby tacitly admitting the validity of the Petition.

Indeed, by arguing only that the Indiana court reached the right result and totally ignoring the Indiana court's method of analysis, Respondent expressly admits at least two of the Indiana court's conflicts with *Nollan*. First, Respondent acknowledges *Nollan*'s requirement that a condition to removal of a land use restriction, requiring a landowner's consent to an otherwise *per se* take, must at least serve the "same" legitimate state interest as does the restriction itself. [Response at 7] However, the Indiana court at best required that the ends need only be "consistent" with each other. [App. at 9 & 11] Second, Respondent accepts, as it must, that *Nollan* requires a level of judicial scrutiny higher than a rational basis in making the determination of the "same" ends. [Response at 9] Again, the Indiana court simply rejected this requirement's applicability to the case at bar, reasoning that *Nollan*'s heightened scrutiny was applicable only to a condition to the removal of the land use restriction requiring an "actual conveyance of property," and not to conditions requiring consent to other types of *per se* takes. [App. at A10]

Finally, Respondent asserts that regardless of the applicable level of scrutiny the condition and the land use restriction in the case at bar serve the same end — preservation, and argues, using *Nollan*'s required analysis, that the Indiana court reached the right result. However, even the Indiana court found that it was the cultural "knowledge" which enhances the general welfare [App. at A8], which knowledge, of course, is

[1] Petitioners have no parent companies, non-wholly owned subsidiaries or affiliates to list pursuant to Rule 29.1.

only possible through excavation and destruction of the Site. This is not pure preservation. No doubt, the Indiana court's recognition that the ends of the condition and of the land use restriction were not the same, led the Indiana court to adopt the requirement that the ends need only be "consistent" with each other. [App. at A11].

To say that acquisition of the cultural "knowledge" is the "same" as pure preservation, where acquisition of the knowledge requires destruction of the area to be preserved, is to make a mockery of judicial scrutiny regardless of the applicable level of scrutiny. The result reached by the Indiana court, that of *de facto* condemnation of archaeologic knowledge without compensation, cannot be sustained if the dictates of *Nollan* are properly followed and applied.

Based on the many conflicts with *Nollan* and the undisputed national import of the Indiana court's decision pursuant to the 26 other states' statutes under SMCRA, certiorari should be granted.

Respectfully submitted,

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